

**BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA**

**IN THE MATTER OF:**

<b>WATER WITHDRAWAL CONTRACTS</b>	)	<b>Administrative Cause</b>
<b>FROM STATE RESERVOIRS</b>	)	<b>Number: 07-100W</b>
	)	
	)	<b>(LSA Document #08-131(F))</b>

**REPORT OF PUBLIC HEARING  
AND CONSIDERATION FOR FINAL ADOPTION**

**I. REPORT OF PUBLIC HEARING**

**1. Rule Processing**

Public Law 231-2007 (H.E.A. 1738) made sweeping changes to laws, most notably IC 14-25-2, governing contracts for the withdrawal of water from reservoirs constructed with state funds. For many years, the Department of Natural Resources had reviewed, and the Natural Resources Commission had given preliminary approval to these contracts (subject to final approval by the Governor), but there were no regulatory standards. P.L. 231 expanded the review process to include mandatory public hearings and an additional substantive role for the Advisory Council. The new legislation also anticipated the development of transparent standards. Preliminary approval of these contracts continues to be the responsibility of the Commission and final approval the prerogative of the Governor.

In anticipation of the likely enactment of P.L. 231, the agency began information gathering on May 1, 2007 pertaining to similar programs in other states and also assembled existing water withdrawal contracts. The first of many rule drafts was distributed between DNR and Commission employees on June 4, 2007. The issues were expected to be vexing, so a temporary rule was drafted on a parallel track to implement the changes made by P.L. 231, and, more generally, IC 14-25-2, during the adoption process for a permanent rule. A temporary rule was adopted and was published by the

Legislative Services Agency at <http://www.in.gov/legislative/iac/20080227-IR-312080117ERA.xml.pdf>. With the correction of technical errors through an *errata* filed with LSA, the applicable current temporary rule is published on the Commission's website at <http://www.in.gov/legislative/iac/20080227-IR-312080117ERA.xml.pdf>.

With the important expanded role of the Advisory Council under P.L. 231, the DNR placed an information item on the Council's June 13, 2007 agenda. The legislation was explained and the first rule draft distributed. A quorum was not present so official action could not be taken, but there was an extensive discussion and an opportunity for individual Advisory Council members to offer comments on the early draft. The pertinent portions of the June 13 minutes reflect:

**Consideration of proposed rule for water withdrawal contracts from reservoirs under P.L. 231-2007 and IC 14-25-2; Administrative Cause No. 07-100W**

Jim Hebenstreit, Assistant Director of the Division of Water, presented this item. He reported the most-recent session of the Indiana General Assembly enacted P.L. 231-2007, codified as amendments to IC 14-25-2, which affects the sale of water from state-owned water supply storage. Hebenstreit provided background of the Division of Water's Sale of Water Program. "What many of you may not know is that the Division of Water and the Department of Natural Resources, and the State of Indiana are in the water supply business." The U.S. Army Corps of Engineers had a program in Indiana and other states during the 1950s through the 1970s to build flood control reservoirs. "At some point in the 1950s, someone recognized that it might be possible to add in a water supply component into those flood control reservoirs." Indiana invested additional funds in Brookville, Monroe and Patoka Lakes to create water supply storage, and the DNR has the ability to sell water from these three reservoirs. Versailles Lake, Brush Creek Reservoir, and Hardy Lake are totally state owned, and they are also reservoirs from which the DNR may sell water. "In effect, Monroe, Brookville and Patoka were created for flood control, but the state then paid the additional cost of creating a larger impoundment, which would also accommodate a certain amount of water supply storage."

Hebenstreit said that IC 14-25-2 sets the legal structure for Indiana to sell water from state owned and financed reservoirs. "We can enter into contracts for both direct withdrawals and releases for downstream use, and the contracts are, by statute, limited to a maximum term of 50 years." He explained that the statutory 50-year contract limit was to accommodate bonds issued by the utilities to finance their facilities. By Indiana statute, the DNR must sell raw water for \$33 per one million gallons ("MG"), "which is pretty dirt cheap".

Hebenstreit noted that most contracts are on Brookville, Monroe, and Patoka Lakes. He said Brookville Lake has a firm yield of 82 million gallons per day ("MGD"). Currently, there are three contracts on Brookville Lake—two golf courses and the Franklin County rural water system. These contracts "only commit less than 1%" of the available supply." Monroe Lake has an available supply of 122 MGD storage with six contracts and is the "sole source" of water supply for the City of Bloomington. "This is really the reservoir that led to the source of the legislation." He explained there was a proposal to supply 80

MGD to the Indianapolis area, which would basically have tied up almost all of the supply for that reservoir between Indianapolis and Bloomington and basically locking Bloomington in with its current contract limit of 24 MGD. Hebenstreit noted that another contract on Monroe Lake is with IPL for release of water to augment stream flow at its Petersburg plant. IPL has had the contract for approximately 20 years, “has never used any water, but still pays approximately \$10,700 every year” to the DNR.

Hebenstreit said for “any contract for water supply, the entity” purchasing the water “would have to construct treatment facilities.” David Lupke asked whether Bloomington was selling treated water, filtered water or raw water. Hebenstreit answered that Bloomington withdraws the raw water, treats the water, and then distributes treated water to its customers, with the Town of Nashville being the only contract outside Monroe County.

Hebenstreit said that on Patoka Lake the state can sell up to 78 MGD, with approximately 21% of that supply currently committed. The only contract on Patoka Lake is with Patoka Lake Regional Water and Sewer District for 20 MG. The District uses water from Patoka, treats it, and sells the treated water to smaller communities. “We believe that [the District’s] service extends to a minimum of eight to nine counties.” He noted that Hardy Lake was built in 1960s, and it is totally state owned. Hardy Lake supplies water for release to the Stucker Fork Conservancy District, a rural water supply system.

Hebenstreit explained that the 2007 statutory amendments govern new contracts and contract renewals. Prior to the new statute, the Division of Water’s contract process did not include a provision for public input. The new statute requires a public meeting to be held in all affected counties, and it “charges the Advisory Council, or gives the Council the ability” to conduct the meetings.

John Bassemier asked, “How do you determine the value of water? Do you look at other states, how much is consumed, or how much is available?” Hebenstreit explained that the statute sets the amount at \$33 per million gallons. “The rates were set based on the state trying to get a return of its investment” with a five-year rate review adjustment for inflation. He said that with the 1970s and 1980s inflation rate, the five-year inflation adjustment would have priced water at a level that would have been cost prohibitive for city governments. “With that, we have evolved to the set amount of \$33 MGD, which was a compromise” between the existing contract rates. Hebenstreit noted that other states charge as much as \$150 per MGD. David Lupke characterized the Indiana statutory rate as being “ridiculously low.” Hebenstreit agreed. Lupke then said, “It also sends communities the wrong message by saying, ‘Water doesn’t have much value.’ From all the news from around the rest of the country, we should realize that water does have a tremendous amount of value.”

Hebenstreit said, “For years, we have had plenty of water that was not committed. The proposal by the Indianapolis Water Company to use Monroe Reservoir, I think, sent a signal to everybody that, ‘maybe, water is a little more valuable.’” Lupke asked whether any of the reservoirs were “running at capacity”. Hebenstreit replied that no reservoir is 100% committed. “21% of Monroe is committed out of its total.”

Lupke then asked, “Has there been any calculation of the environmental or ecological needs?” Hebenstreit explained that the original contracts between the federal government and Indiana recognized the reservoirs as being for flood control and water supply, and they do not mention recreation or the environment. “Each reservoir has a couple of different purposes, but some of them actually have contracts to use the water to release downstream for water quality purposes, but nothing says we have to evaluate the environmental impacts on the reservoir itself.” Lupke asked, “Or the downstream impacts?” Hebenstreit said, “No. There is a minimum release on each reservoir, but all

those numbers were developed in the 60s, so I don't know if they are necessarily adequate."

The Chair inquired of the underlying purpose of the new legislation. "The legislators who sponsored the bill, what were they trying to keep from happening, or what were they trying to control?" Hebenstreit answered, "I think the legislators were trying to make sure that, say, Bloomington had a voice if the supply capability of the reservoir was going to be maxed out." The Chair asked if he understood correctly that Monroe Lake was not at capacity, but the proposed contract with Indianapolis "would have put the reservoir at capacity". Hebenstreit answered, "That is correct." The Chair said, "So, what the legislation calls for is for there to be a public hearing." Lucas responded that the legislation requires "several" public meetings, one for each affected county.

William Wert asked, "Is there a sense in the municipalities that continued growth obviously demands more water? At some point, we do not have any more water to commit to them." Hebenstreit said, "I think that is an issue that is lost on most people right now, because, I think, Indiana has been looked at as a state with all the water we need." Wert said, "I know, but in other states it is an issue." Lupke said that some areas of Indianapolis "could get there with the growth." Hebenstreit reflected that 20 years ago the economic feasibility of piping water from Monroe Lake to Indianapolis would have been questioned. With the draft proposal from Indianapolis, and the response from Bloomington, the need to view feasibility must be considered in a larger geographic context. He then deferred to Steve Lucas to outline procedural aspects of the 2007 statutory amendments.

Lucas explained that an early draft of the legislation would have required the Advisory Council to "conduct the public meetings." He noted that an amendment was made to the bill to allow the Advisory Council to "delegate the meeting authority to someone to conduct the meeting on its behalf." He said the authority for rule adoption under IC 14-25-2 "goes back to 1955, but Indiana has never had any rules based upon this authority, probably because there was a sense that we had all the water we needed." He said that the Division of Water has conducted analyses of water contracts on a case-by-case basis, but "there is not really a process in place. There's not a public process for review," and there are no published "evaluation standards."

Lucas said the legislation was "given an emergency clause so it went into effect immediately. We do not have any standards, and the standards need to be by rule. We can't do a permanent rule" quickly enough to address immediate needs, "although the Director can do a temporary rule that can be put in place pretty quickly." Lucas said that the rule "ultimately" will need to have "substantive parts". He said the proposal contained in the Advisory Council's packet is a "rule in progress. You usually do not see rules in such a crude form. What we are looking to accomplish is if this Council would give its blessing to a process, and then if the Director saw fit, he could adopt a temporary rule." Lucas said a proposed permanent rule would be brought back to the Advisory Council at a later date, and this proposal would include substance as well as process.

Lucas then focused his discussion upon proposed 312 IAC 6.3-3-3 that would govern the requisite public meetings. He said the proposal would delegate authority to the Director of the Division of Water to "assign someone, probably someone from the Division of Water, although the Division Director could appoint another DNR employee" to conduct the public meetings. "It might make sense in some situations to appoint someone from the Office of Legal Counsel." He explained that the person delegated would hold the public meeting as described in the proposed rule. The public meeting structure is statutory, but the process is "really wide-open to what you are going to evaluate." The public meeting would be informal and would not be an evidentiary hearing. "There will be flexibility." The proposed rule would also provide that the hearing officer could

maintain a record but would not be required to prepare a transcript. What the hearing officer does “if taking notes, or recording the meeting, would be the official record.”

Donald Van Meter noted that 312 IAC 6.3-3-3(d) states that the hearing officer “may” maintain a record. “There has to be some kind of record.” He suggested replacing “may” with “shall”. Van Meter added that the hearing officer would still have flexibility because the proposed rule still would not “dictate the kind of record.” Lucas said, “That’s a good comment,” and he reflected the draft could be modified accordingly if it were the will of the Advisory Council. The members who were present expressed concurrence with Van Meter’s modification, and Lucas indicated the modification would be incorporated.

Lucas said that 312 IAC 6.3-3-4 sets forth the duties of the Advisory Council. “The Advisory Council is a critical cog in the machine. You would need to review what the hearing officer recommends.” Lupke commented, “I think there could be some discretion on the part of, perhaps the Chair.” If the Chair were to decide “it’s a non-controversial situation, delegation would make a lot of sense. In the case that there might be controversy, the Chair could say ‘we need the entire Council, or as many as possible present for the meetings.’” Lucas responded, “You can certainly do that. That’s your prerogative.” Lupke asked, “Is it under the Advisory Council’s discretion?” Lucas responded, “It’s the Council’s public meeting.”

Patrick Early reflected that, pursuant to the proposed rule, the Advisory Council “would, in essence, assign a proxy.” Lucas added that the proposed rule could be modified to give authority to the Chair, rather than the Director of the Division of Water, to make the appointment of hearing officer. Requiring the Chair to make this appointment “probably would be a burden sometimes,” although he believed doing so would be lawful.

The Chair said, “We would sometimes be able to predict where there is going to be a lot of contention. But, I think, being consistent and doing it the same way so that the hearing officer goes to every single meeting,” would result in greater predictability. In either approach, “the hearing officer has to come back to us so the Advisory Council would have fulfilled our obligation with the hearing going to all those individual counties.” Having the Director of the Division of Water select the hearing officer, particularly where as many as eight or nine public meetings might be required, could be implemented more efficiently.

Lucas said, “That was the way we envisioned it, but it is your call.” Pursuant to the rule proposal, the Advisory Council would still “look at the summary presented by the hearing officer, and would consider recommendations from the division that manages the reservoir, recommendations from a federal, state, or local agency with expertise regarding water usage and supply, and then any information received at the Advisory Council meeting to which the report was presented.” The Council members present ultimately determined to approve the delegation of appointment by the Director of the Division of Water as set forth in the proposal.

Lucas noted that, by statute, the Advisory Council would submit a summary and recommendation to the Commission not later than 30 days from the date of the public meeting. “That’s a pretty narrow window considering how things function.” He said the proposed rule would put a fine point on this requirement by reflecting the 30-day time limit would, where multiple public hearings were conducted, be measured from the final public meeting. Van Meter reflected that this approach was logical.

Lucas said, “What we would be looking for is your informal blessing. The Council doesn’t have a quorum, but at least in the short term, it is the Director’s prerogative on an emergency rule. You would be making a suggestion to the Director. Later on, you will

be making a recommendation to the Commission” with respect to preliminary adoption of a permanent rule. He also referenced several clerical errors to be corrected from the distributed draft.

Bill Pippenger inquired whether “20 days” under 312 IAC 6.3-3-5(d) could be amended to read “20 working days or 20 business days.” Lucas indicated that section (d) is a restatement of statute. “That would be a good idea, if we could do it.” Unfortunately, the Commission did not have discretion to modify this subsection.

Pippenger asked whether an “inflation clause or escalator clause” could be added to the rule proposal. Lucas said he deferred to Jim Hebenstreit, but “I think the price is locked in” by statute at \$33 per MG. Hebenstreit confirmed this perspective.

Chairman Early observed a quorum was not present. The Advisory Council could not take official action, but the individual members could offer a statement of consensus to the DNR Director for the preparation of a temporary rule. The members present then expressed a unanimous consensus that the draft procedural elements of the rule proposal be recommended to Director Carter for a temporary rule. The draft was recommended as presented but with the correction of referenced clerical errors and with the substitution of “shall” for “may” in proposed 312 IAC 6.3-3-3(d).

The Department returned to the Advisory Council for its October 10, 2007 meeting for further discussion and to receive additional informal comments on a revised permanent rule proposal. Again, there was not a quorum, although the Council endorsed the principles discussed on October 10 during its February 13, 2008 meeting when a quorum was present. The pertinent portions of the October 10 minutes provide:

**Consideration of Recommendation for Preliminary Adoption of Proposed New Rule for Water Withdrawal Contracts from Reservoirs under P.L. 231-2007 and IC 14-25-2; Administrative Cause No. 07-100W**

Ron McAhron said that discussions were held prior to today’s meeting regarding the Advisory Council’s involvement in the “ambitious” public hearing process required for the sale of water. He noted that currently there are no standards existing for consideration of the “merits of sale proposals” that come to the Department. McAhron said that a temporary rule “to flesh out the standards” is being drafted for the Director’s signature with the intention to present for preliminary adoption a permanent rule at the Commission’s November meeting.

McAhron noted that the proposed rule contains a “dynamic” list of lakes and reservoirs in which the statute would be applicable. “That list may expand; it may contract.” He asked that the Advisory Council consider “conceptually” the proposal. McAhron stated that the statute was “clearly aimed” at Brookville, Patoka, and Monroe, “which are the main reservoirs that [the Department] and the Corps have partnered with 50 some odd years ago to put in water supply storage.” He noted that the statute is also seemingly applicable to Brush Creek Reservoir, Versailles Reservoir, Hardy Lake, and “some of the other northern lakes could be added.”

McAhron noted that Brookville, Monroe, and Patoka Lakes have a sediment storage component, a water supply storage component, and a flood storage component “built in.” He then deferred to Jim Hebenstreit. Hebenstreit noted that a presentation was made to the Advisory Council at its June meeting regarding an amendment to the statute (P.L. 231-2007 and IC 14-25-2) governing sale of water, a program which the Division of Water administers. “A lot of what that bill did was put in a process for public input on

proposed requests to buy water.” He explained that previously requests were processed internally, “unlike all our other applications where there has to be a notice to adjoining owners and a public notice.” The new legislation also requires certain information, such as an explanation of the request to be provided at the public meetings. “Right now, we don’t have an application form for requests to buy water.”

Hebenstreit said that the proposed rules address the conduct of the public meetings and provide standards for the submittal of an application. He explained that “minimum quantities of stream flow” would be defined at 312 IAC 6.3-2-5. He noted that the proposed rule incorporates the original federal contracts stated minimum of discharge that has to be maintained particularly with Monroe, Brookville, and Patoka Lakes. He said that the minimum discharges for Brush Creek, Hardy Lake, and Versailles Lake were not stated in the federal contract, and they have been calculated by Division of Water’s engineers.

Rick Cockrum asked, “What drives the stream flow? It’s a contract with the Corps and Indiana?” Hebenstreit responded that the contracts are between Indiana and the U.S. Army Corps of Engineers. Cockrum continued, “Which was developed when the dam was designed?” Hebenstreit answered in the affirmative. Cockrum said, “The reason I am asking is because I think there has been a significant change at Brookville with the development of the trout fishery. Now the U.S. Fish and Wildlife Service is stocking it, and 40 cubic feet per second is a trickle.” Cockrum then asked, “But that would be almost impossible to change because it’s part of the original contract?” Hebenstreit answered, “I’m not sure that it couldn’t be changed. I’m not sure that anybody has brought the issue up. That is something we could probably look into.” Hebenstreit commented that he was not aware of how the minimum stream flows were calculated in the original federal contracts. “We just asked the Corps six months ago what happens when the original 50-year contract between Indiana and the U.S. government for Monroe Lake expires. In two or three years, the contract expires. Will we pay more or will we have the ability to sell water, and what can we guarantee users down the road?”

Cockrum noted that “at one point, the fisheries guys had asked the Corps to consider a lower on-flow, and I thought that equilibrium changed pretty dramatically when the U.S. government started stocking. Now you have a sister federal agency that has an investment.” Hebenstreit noted that the contract requires a minimum stream flow, “so if they need to go higher, they could.”

The Chair asked, “Who makes the decision on a day-to-day, week-to-week, month-to-month what the daily stream flow is? Hebenstreit explained that the Corps provides the daily operation on Monroe, Brookville, and Patoka. He said that the Corps will release water to get to the winter pool in the fall, and lower it in the spring for summer pool.

Cockrum noted, “If they shut down to 40 cubic feet per second, they would lose probably eight years of stocking.” Hebenstreit said that the “flip side” is there is “always a problem that the Corps has if they release too much then they cause downstream flooding. They balance that.”

McAhron said, “I think what they are looking at here is when under drought conditions, if there is a competing use.” Cockrum noted that when the contract was entered into, stocking “may not have been an issue. It’s a new factor.” McAhron noted that Brookville has 20 billion gallons of storage capacity. “We are currently selling 243 million gallons. It’s like one percent of the capacity that’s built into it.” He said the minimum stream flow is “way, way removed from the actuality right now.”

The Chair asked, "This only comes into play when we are selling so much of it that the demand on the water increases." Hebenstreit said that presently the Department has not received requests to purchase water in the last 20 years "except for a few golf courses. By and large, we have got a bunch of untapped supply available."

Cockrum noted that the Department has entered into a contract with a power company to allow emergency release for downstream cooling. Hebenstreit said that Indianapolis Power & Light has had an agreement with the Department since the 1980s. "They pay us \$10,000 or \$11,000 a year, and they have never actually used the water." Cockrum asked, "Does that fall under this, too?" Hebenstreit answered in the affirmative, and he said the proposed rule governs direct withdrawals as well as releases to downstream users for withdrawal.

Hebenstreit said that 312 IAC 6.3-3(b) contains a list of types of information that an applicant would submit to the Department. Some of the information requested is standard for permit applications. He explained that in subsection (7) the proposed term of the contract, in years, "which could be up to 50 years", would need to be submitted. Hebenstreit noted that with existing contracts the terms have ranged from 20 to 40 years, "depending usually on a bond issue to finance the utilities' facilities."

Hebenstreit said that the Department "anticipates" the demand on the lakes is "going to pick up" in the future. The proposed rule requires a justification as to "why the reservoir is the most economic or feasible alternative." A list of alternative water supply sources and a conservation plan would also need to be submitted. He said that the "conservation plan" requirement was added for drought situations. "If we have committed a lot of the [lake] storage, we may have to have everyone share the hurt and gear back on the withdrawals."

Hebenstreit explained that 312 IAC 6.3-3-3 sets standards for the conduct of the public meeting, and 312 IAC 6.3-3-4 provides standards for the Advisory Council's role in the water withdrawal contract process. The Advisory Council would consider the hearing officer's written summary of the public meeting and recommendations and submit a report to the Commission not later than 30 days from the final public meeting. 312 IAC 6.3-3-5 sets forth the process for Commission action on contracts and subsequent approvals. He said that the contracts "eventually" are sent to the Governor for signature and accompanied by a report on the impact on the recreational facilities of the withdrawal.

Hebenstreit said that proposed 312 IAC 6.3-4-1, which sets standards for water allocation principles and priorities, "may draw some interest". He explained that the section "spells out" the factors that the Commission will consider regarding water withdrawal applications. Subsection (5) sets priorities for the use of water in the event there is more demand than supply. "This is our staff's stab at it. There is some statutory basis for drinking water for human beings and drinking water for livestock.... I'm sure that there will be debates on whether industry, agriculture, or power production are more important. We chose to make power production the third priority.... We punted on industry and agriculture and lined them up as even. In the end, I do not see those in the higher priorities with drinking water systems that need water."

Donald Van Meter asked, "When you say 'industry and agriculture' you're thinking agriculture as being irrigation?" Hebenstreit answered, "Yes." Van Meter said, "Because agriculture is for livestock and poultry."

Cockrum said, "I don't know what this priority means. When it says 'health and safety' is that fire suppression? Shouldn't that rank above drinking water for livestock, poultry,

and domesticated animals?” Pippenger suggested amending clause (B) to read “health, safety, and fire suppression.” Cockrum said, “My suggestion is to clarify it and move it up.” Hebenstreit suggested that “health and safety” would need to be defined. Stephen Lucas, Director of the Commission’s Division of Hearings, noted that the first priority has a statutory basis.

The Chair asked, “This isn’t really relevant today, is it?” McAhrn responded that the Department does not have any withdrawal contracts that are strictly for fire departments. The Chair clarified, “I’m talking about overall demand.” Hebenstreit said, “We don’t have competing uses now, but that’s why it is good that we are having to do this now, because I think some day down the road we are going to get to a point for the rule’s necessity.”

Cockrum suggested including the recognition of the impacts of withdrawals on recreational use of the lakes. Hebenstreit noted that there are purposes defined in the agreements between the Indiana and the federal government for the use of the lake. “Monroe, for instance, does not include recreation. So, there will be a point in time when we could have contracts entered into that, in a drought, we will reduce the water levels at a point where all of our boat ramps that DNR has invested in are probably going to be out of use and maybe potential impacts on fisheries. That’s probably a policy call that needs to be looked at.” Cockrum said, “It just seems like it should be one of the considerations.” Hebenstreit noted that subsection (2) requires the review of the “likelihood of adverse effects to public safety, the environment, or navigation. “That is a factor the Commission would consider.” Cockrum suggested, “Could you add ‘recreation’ in there and assume that would include angling, boating?” Hebenstreit answered in the affirmative.

McAhrn said that other Department divisions will be reviewing the potential impact of a sale of water. “I think it makes sense to include” recreation.

Hebenstreit explained that 312 IAC 6.3-5-2 allows the Department director to declare drought alerts. Levels of severity would be assigned to a drought situation. He said the state prepared a Water Shortage Plan in 1994 that categorizes droughts by “watch, warning, and emergency. This section reflects the numbers that are assigned to these different indices.” Hebenstreit noted that, in preliminary reviews of the proposed rule, it was questioned whether the Palmer Hydrologic Drought Index is the correct index to use. He also noted that the Department has had discussions with the office of the Indiana State Climatologist, and a different indicator index may be preferred. “In all likelihood, this section will need to be revised.”

Cockrum asked for clarification for the use of the term “director” in the rule proposal. Lucas explained that a query was made as to who should have the authority to reflect upon there being a need to rescind a contract because of a violation. “The discussion was, well, whose contract is it? The way it was originally written it was the director of the Department. The Governor approves the contract, but the statute says essentially it is the Commission’s contract. So, to try to be parallel with that thought process—and maybe by doing so we became unparallel otherwise—we reflected since it is the Commission’s contract, it would be the Secretary of the Commission that would be taking the action.” Lucas noted that, “by tradition and not by statute”, the Director of the Department and the Secretary of the Commission is the same person.

Cockrum then asked, “So, in this capacity of enforcement, the Secretary is acting as an extension of the Commission?” Lucas answered in the affirmative. The rule would help administer a process for evaluating contracts and is not regulatory. By statute, the Commission does not make initial licensure decisions. The Director or his designee does.

The underlying statute for water sale contracts provides that the Commission does, however, make this contracting decision, although it is subject to conditions subsequent of approvals by the Attorney General and by the Governor.

William Pippenger suggested amending 312 IAC 6.3-3-1 to “reverse” subsection (9) and subsection (10). “Why don’t we make [the applicants] look at all the alternatives before they try to justify” that the reservoir as the most economic or feasible water supply source. Hebenstreit said, “That makes sense.”

Hebenstreit provided Council members with a schematic illustrating the cross-section of a reservoir. He explained, “At the lowest part of the reservoir is the sediment pool. There is some expectation that sedimentation will occur on all the reservoirs. So, they have allocated that the reservoirs could be filled from the natural bed up to the lower elevation of the water supply storage, which is above the sedimentation pool and extends to the winter pool level and flood storage capability of the reservoir is the uppermost portion.”

Van Meter asked, “Do you have any idea how much of the sediment pool is already filled on any of the reservoirs? Hebenstreit responded it was his understanding that the Corps is required to do periodic surveys. “They might have done some work in Monroe, but I don’t think they have found that there had been much sedimentation.” He added, “We don’t think we have a problem, but that question was raised at a study committee the other day about whether or not sedimentation is starting to encroach into the water supply storage.” Hebenstreit said he would contact the Corps for additional information.

McAhron introduced Monique Riggs, with the Division of Water, who was a major participant in drafting the proposed rules. “The whole staff has worked very hard. This is a complicated matter. It’s never been a big problem for us. We have been able to float along.... The statute sort of woke us up.” He also thanked the Advisory Council for helping to “fine tune” the rule proposal. “The main thrust of the legislation was the series of public meetings, but we tried to put some other meat on here for consideration. We appreciate your feedback.” Hebenstreit asked Council members, if after today’s meeting they had additional feedback, to forward it to himself or Steve Lucas.

After incorporating the additional informal comments from the Advisory Council members, as well as internal recommendations from the Division of Water, the DNR offered a refined draft permanent rule to the Natural Resources Commission for consideration as to preliminary adoption at its meeting of November 13, 2007. The Commission gave preliminary adoption as reflected in its November minutes:

**Consideration for preliminary adoption of new rule, 312 IAC 6.3, for water withdrawal contracts from reservoirs under P.L. 231-2007 and IC 14-25-2; Administrative Cause No. 07-100W**

James Hebenstreit, Assistant Director of the Division of Water, presented this item. He explained that IC 14-25-2 enables Indiana to enter contracts to sell water from reservoir impoundments that were State financed. “We can contract to also sell minimum stream flow withdrawals downstream of the reservoir.” He said that by statute the price of the water is \$33 per million gallons.

Hebenstreit said the statute dates back to the 1960s, and most of the earlier contracts date back to the statute’s effectiveness. “Most of the contracts are on Monroe, Brookville, and

Patoka Reservoirs, and there are also some sales of water from Hardy Lake, and really small sales on Brush Creek and Versailles Lake.” He provided a brief overview of the existing contracts on the main three reservoirs. The Monroe, Brookville, and Patoka Lakes were built first for flood control storage. “The state decided that it would pay extra money to finance additional storage in those reservoirs for public water supply.” Hebenstreit noted that the water sale contracts specify the elevations between which the water is located that can be sold.

Hebenstreit noted that Monroe Lake is the sole source of water supply for Bloomington. The reservoir has a “dependable yield of 122 million gallons per day, and Bloomington’s contract authorizes the city to take up to 24 million gallons per day.” He explained that the State sells water to Bloomington, and Bloomington then sells water to communities in surrounding counties.

Hebenstreit said that the Patoka Regional Water and Sewer District (PRWSD) is the primary customer on Patoka Lake. The PRWSD has a contract that allows withdrawal of 20 million gallons per day. “That’s about 20% of the storage of the reservoir.” He said the PRWSD distributes water to communities located in ten to eleven counties. “That is probably what the legislature envisioned originally when the state was authorized to enter into contracts is to provide regional water supply.”

Hebenstreit said that “for years there has not been much demand from the public to buy water from the reservoirs. A lot of the storage is uncommitted.” The Department has not “got into competing uses, but that changed a couple years ago when there was a proposal to bring some of the water from Monroe Lake to Indianapolis, which would have, if approved, committed almost all” of the storage capability. This proposal initiated a statutory amendment which required the Advisory Council to conduct public meetings when a contract proposal is received. During a public meeting, the Department would discuss the nature of the pending request, the process by which the Commission would determine whether to enter into a contract, and would provide an opportunity for public comment. Previously, the contract review included no criteria to “spell out” what the requirements were or what type of data to submit. The statutory amendment and the proposed rule would bring this program more in line with the other regulatory programs.

Hebenstreit then provided an overview of proposed new rule 312 IAC 6.3. He said 312 IAC 6.3-2-5, which governs minimum quantities of stream flow, defines the minimum releases which must be maintained from the reservoirs. The contracts with the federal government provide what minimum releases the U.S. Army Corps of Engineers would maintain. Hebenstreit said Rule 3 clarifies procedures. Section 1(b) would define what an application must include for submission to the Department. Section 3(b) covers the public meeting that is held in each county in which the requesting party is located and in any county where water would be distributed. Section 4(d) defines what the Advisory Council may consider, which also includes other information from other DNR divisions, state and federal local agencies, and public comments.

Hebenstreit said Rule 4 would govern contract terms and conditions. Section 1 includes water allocation factors and sets priorities. He said the Commission has contracts with a “couple of golf courses to buy water from the reservoirs. If, I think, demand ever got higher and there was more interest in drinking water versus golf courses, I think the golf course would fall out of the mix and the drinking water would be a higher priority.”

Hebenstreit said Rule 5 was directed to drought alerts. Section 2 outlines how the Department declares drought alerts and generally follows the state’s current water shortage plan. The rule also includes indices that might be used to gauge a drought warning or drought emergency. “We’ve already had an indication from the State

Climatologist that the proposed use of the Palmer Hydrologic Drought Index may need to be changed. So, as this moves through the process, we suspect that that will have to be revised.”

Mark Ahearn asked if the reference in proposed 312 IAC 6.3-3-5(c), to IC 4-21.5-2-5(11), identified appeal rights under AOPA. Lucas responded the cross-reference specified that the rule defined the disposition of property by contract and did not establish a right to adjudication under AOPA. Contracts are exempted from AOPA by IC 4-21.5-2-5(11). Lucas also said, “This is really a contract process, not a licensure process.”

Jane Ann Stautz referenced 312 IAC 6.3-4-1 regarding water allocation factors. She asked for clarification on how the priorities for the use of water were established. Hebenstreit responded that an Indiana statute states that drinking water for humans and livestock is the first priority. Under the proposed rule, the second priority would be health and safety, which he said was based on “experience with other water management programs.” Stautz observed that as the rule proposal moved through the process, seeking to define priorities was likely to invigorate discussion. “As you look at other states and what is happening elsewhere, like Atlanta, there’s been a lot of discussion around prioritization and application.” Hebenstreit agreed and added, “If you look at our water shortage plan, the cry has always been you need to have priorities in there. We’ve made that effort here.”

Larry Klein asked if the contract with Bloomington was for a period of 50 years. Hebenstreit responded the statute allows contracts to be entered for a period of 50 years. He explained that the original contract with Bloomington, which “expired a couple of years ago, was for 40 years. When most of those contracts were entered the applicants asked for the longer term to coincide with bond issuances, and that was a financing concern with them, so that’s why there are longer terms.” Hebenstreit said not all contracts are for 50 years. He said, “One golf course contract is a ten-year contract and another one a 15-year contract.” Lucas added that the 50-year contract is a statutory ceiling. A contract is not required to be 50 years long, but it is prohibited from being longer than 50 years.

Klein asked, “Who makes that determination on length.” Lucas answered, “You do as the Commission.” Klein asked if he correctly understood. “We can control time, but we can’t control price? To some extent, we can control consumption by these rules?” Hebenstreit agreed. He added that the proposed rule states an entity seeking a contract “has to show that it has looked at other alternatives for water supply before a contract for withdrawal from a reservoir would be approved by the Commission.”

Doug Grant asked Hebenstreit, “What would you approximate the market rate is for raw water from a reservoir?” Hebenstreit responded, when the rates were originally established for the contracts, they were calculated based on the state gaining its return of investment. “I forget what dollar amount they figured, but Bloomington started it in the 1960s at a rate of \$42 dollars. I think when we looked at it in the 80s or early 90s, it would have been \$120 per million gallons. Klein continued, “And, they’re still paying \$33 dollars?” Hebenstreit replied, “Yes, so, I’d guess at today’s price, if you look at the state’s return on investment, it’s probably over \$200. Several other states have a flat rate, too, but it’s up in the \$100, \$150 or \$200 range. So, it’s a dirt-cheap way to get water” in Indiana.

The Chair reflected, “This document that is before you is a great example of what the Advisory Council will do as a result of some legislative action. The draft principally came as a result of Jim, Steve, and Deputy Director, Ron McAhron, who received input from staff, wrote this, and now it’s before the Commission for a preliminary adoption. I just want to thank you for the level of attention and detail, and I want to thank Chairman

## AGENDA ITEM #22

Early and the Advisory Council for their review and for addressing these issues in a very meaningful fashion. So, it's a very good example of the macro work that this Commission does."

Commission Member, Damian Schmelz, asked Hebenstreit if the "terrible misfortune" in Georgia presented a lesson in to "really examine the water withdrawal contracts." Hebenstreit replied, "Yes, and people have pushed us to do stuff both on the water shortage plan, because they are now saying, 'Don't wait until you're in that situation to have to start making those kind of decisions.'"

Commission Member, Doug Grant, asked Hebenstreit what the amount of yearly revenue was for Indiana from these water contracts. Hebenstreit replied, "About \$250,000." Larry Klein expressed concern with approving 50-year contracts, with the possibility of the cost of water "going through the ceiling". He said if that were to occur, "the Commission's hands would be tied by a contract which was written 50 years ago or 30 years ago." He suggested there be "review periods" that could be adjusted based upon supply, demand or on scientific evidence that would "urge one to rethink the contract" or provide an opportunity for review. "Let's say the legislature in two years says we're going to go to \$130 dollars per one million gallons, and we've just approved four 50-year contracts."

Lucas responded, "You decide the contract terms, so the solution to that is when the Commission decides to approve a contract, you don't approve a 50-year contract if you think it is a bad idea. This rule proposal doesn't say you have to approve a 50-year contract. This says that legally you cannot approve a contract that is longer than 50 years. The rule restates the statutory maximum."

Hebenstreit added, "And, that's what we're doing now. The golf courses are for a shorter period, because we figure in ten years there may be a change in demand, and maybe we won't want to sell it to a golf course."

Jane Ann Statutz moved to give preliminary adoption of new rule (312 IAC 6.3) for water withdrawal contracts from reservoirs to help implement P.L. 231-2007 and IC 14-25-2. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

Following preliminary adoption by the Natural Resources Commission, a "Notice of Intent to Adopt a Rule" was posted in the INDIANA REGISTER for proposed 312 IAC 6.3 on March 24, 2008 as DIN: 20080319-IR-312080131NIA. The notice identified James J. Hebenstreit as the "small business regulatory coordinator" for purposes of IC 4-22-2-28.1. The proposed new rule section was identified by the Legislative Services Agency as LSA Document #08-131. No comments were received in response to the "Notice of Intent to Adopt of Rule".

Proposed 312 IAC 6.3, along with the necessary fiscal impact analysis, cost-benefit analysis, statement concerning rules affecting small businesses, and a copy of the published "Notice of Intent", were submitted to the Office of Management and Budget on

March 28, 2008. In a letter dated April 21, 2008, Christopher A. Ruhl, Director of the Office of Management and Budget, recommended that the rule proposal be approved.

On May 23, the NRC Division of Hearings submitted proposed 312 IAC 6.3 to the Legislative Services Agency along with an “Economic Impact Statement”. On May 28, the Legislative Services Agency informed the Division of Hearings that LSA’s intended date of publication for the proposed amendments was June 4, 2008. Consistent with the intended date of publication, the Division of Hearings provided the Legislative Services Agency with a draft public hearing notification.

The Legislative Services Agency issued to the Commission an “authorization to proceed” with the rule adoption on May 29. June 4, 2008 was confirmed by LSA as the intended date of publication for the rule proposal.

On June 4, 2008, Legislative Services Agency published a notice of public hearing and the text of the proposed rule amendments in the INDIANA REGISTER. In addition, LSA published the “Economic Impact Statement” for the proposed amendments in the INDIANA REGISTER as follows:

**TITLE 312 NATURAL RESOURCES COMMISSION**

**Economic Impact Statement**

LSA Document #08-131

(Administrative Cause No. 07-100W)

**IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses**

**Estimated Number of Small Businesses Subject to this Rule:**

The Department of Natural Resources (DNR) currently administers 11 contracts for the sale of water from state-financed reservoirs, 10 of which are believed to be held by small businesses as defined under IC 4-22-2.1-4. Among these 10 is one contract that expired on March 15, 2008, and for which a new contract application has not been submitted.

**Estimated Average Annual Reporting, Record Keeping, and Other Administrative Costs Small Businesses Will Incur for Compliance:**

For new contracts or contract revisions, small businesses will incur under these proposed rules an estimated cost of \$18,000 for the compilation of information required by the DNR under the written request. The information includes an engineering study of all available water sources, a justification of water withdrawals, and the development of conservation and contingency plans. The DNR considers submittal of the information critical for the proper implementation of P.L.231-2007. In addition, the small business may also incur costs associated with public meeting attendance. The cost of work necessary for a new or revised contract could be averaged over the life of the contract, which can extend for a period of up to 50 years.

**Estimated Total Annual Economic Impact on Small Business to Comply:**

The proposed rules may be applicable to only one small business during the first 12 months following implementation. The remaining contracts between the DNR and small businesses would continue to be effective. The next expiration of an existing contract would occur in July 2013. The remaining contracts would expire at various intervals between 2013 and 2043.

The economic impact of the proposed rules is based upon an estimate of costs, made by an established and reputable engineering firm with offices located in Indiana, for compiling information for the “written request”.

**Justification Statement for Requirement or Cost:**

All costs that would be incurred by small businesses under the proposed rules are reasonably required for the implementation of P.L.231-2007.

The economic impact of the proposed rules is based upon an estimate of costs, made by an established and reputable engineering firm with offices located in Indiana, for compiling information for the “written request”.

**Regulatory Flexibility Analysis of Alternative Methods:**

All compliance and reporting requirements are specified by IC 14-25-2 (particularly as amended by P.L.231-2007). As a result, no regulatory flexibility analysis of alternative methods was conducted by the DNR.

In addition to publication in the INDIANA REGISTER, notice of the public hearing was published in the Indianapolis DAILY STAR (a newspaper of general circulation in Marion County, Indiana) on June 6, 2008; and, on the statewide calendar for the website of the Natural Resources Commission. The proposal was also featured on the Commission’s website for “Proposed Rules”, where a link allows a citizen to comment directly online.

The DNR’s Division of Water informed representatives of the active water withdrawal contracts of the proposed rules by telephone, email, or both. Either telephone conversations or voicemail messages resulted, and, where feasible, notices of the public hearing and a link to the NRC’s website was included with an email.

In accordance with IC 4-22-2.1-5(c)(2), proposed 312 IAC 6.3 and a completed Small Business Impact Statement for the proposal were sent by email to the Indiana Economic Development Corporation. On July 3, 2008, Ryan Asberry, Assistant Vice-President of IEDC wrote in substantive part in response:

Pursuant to IC 4-22-2-28, the Indiana Economic Development Corporation (“IEDC”) has reviewed the economic impact analysis for small business associated with rule changes proposed by the Indiana Department of Natural Resources (“DNR”) and contained in LSA Document 08-131. The proposed rule adds 312 IAC 6.3 to assist with the implementation of P.L. 231-2007 to IC 14-25-2 with respect to water withdrawal contracts for water supply purposes from the water supply in reservoir impoundments that are financed by the state. The proposed rule sets forth requirements, pursuant to P.L.

231-2007, that must be satisfied by businesses seeking contracts to withdraw water from state owned reservoirs. DNR records indicate that there are eleven (11) businesses currently holding such contracts and that ten (10) of those businesses are classified as small businesses.

DNR indicates that the proposed rule will impose costs on small businesses associated with compiling the information that must be included in the businesses' request for a contract to withdraw water from state owned reservoirs. This information must include an engineering study of all available water resources, a justification of water withdrawals, and the development of conservation and contingency plans. The estimated cost to compile this information is estimated to be \$18,000 per business seeking a contract. This estimate was arrived at in consultation with a reputable engineering firm with expertise in this industry. While this cost is significant and must be incurred prior to receiving the contract, the term of such contracts can be up to fifty (50) years. Thus, the cost is not anticipated to be a regularly recurring cost.

Although the cost associated with compliance with the rule is significant, the requirements set forth in the rule are deemed critical to carrying out the intent of P.L. 231-2077. The cost is not intended to be frequently recurring. Additionally, revenue received from receiving a contract to withdraw water from state owned reservoirs would offset the cost associated with compliance with the rule.

The IEDC does not object to the economic impact to small businesses associated with the rule changes. If you have any questions about the comments contained herein please contact me at 232-8962 or [rasberry@iedc.in.gov](mailto:rasberry@iedc.in.gov).

Later on July 3, 2008, the hearing officer thanked Ryan Asberry for his "timely and thorough comments" with respect to LSA Document 08-131. He reflected to Asberry that since the IEDC "commented favorably upon the agency's fiscal analysis" and "suggested no alternatives, the agency will recommend that the Natural Resources Commission move forward with consideration for final adoption" of proposed 312 IAC 6.3. Also, later on July 3, 2008, the Commission's paralegal caused Asberry's comments to be posted on the official website of the State of Indiana and Natural Resources Commission.

The proposed new rule section would not have a total estimated economic impact greater than \$500,000 on all regulated persons as described in IC 4-22-2-28(c). Even if all ten or eleven existing regulated entities were to seek new water withdrawal contracts in the same year (an implausible contingency), the impact would be less than \$200,000.

## **2. Public Hearing and Written Comments**

The public hearing was convened as scheduled on July 11, 2008 in Room 501, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana. No member of the public appeared for the hearing.

Written comments were received by on July 10, 2008. On that date, Jack Wittman, Ph.D., CGWP and President of WHPA, Inc. in Bloomington, Indiana wrote:

As a professional hydrologist and a representative of the public on Indiana's Water Shortage Task Force, I am writing to you to support the proposed...312 IAC 6.3 that governs water withdrawal contracts from state reservoirs.

In the past the "trigger" used to define the status of water supplies in any area was the Palmer Hydrological Drought Index (PHDI). This indicator is referenced in the state's Water Shortage Plan and is very commonly used in more arid parts of the country. The PHDI is one of the first methods to define drought conditions and over the past 45 years it has proven to be a functional approach to identifying drought severity in agricultural areas. However, as our group learned from some of the experts that testified before the Task Force, other indices may provide the same technical information and be more sensitive to the kinds of drought that occur most often here in Indiana.

The Standardized Precipitation Index (SPI) being proposed to replace the PHDI is both simpler and more sensitive to the kinds of meteorological conditions that cause drought and water shortage in our state. Where the Palmer index may capture longer term concerns (e.g., soil moisture deficits) that could affect some water users, the SPI, in combination with some information about the flow conditions in streams and water levels in lakes, is a better tool for the job. Our group learned that many other states use such a combined approach to distinguish between regions that have a shortage and those that are not in deficit.

Consequently, as a representative of the Task Force and as a professional watershed scientist and groundwater hydrologist, I want to lend my support to this revision in the rule. In effect, this change will make the state's approach to declaring drought alerts more responsive to the shorter duration events that can cause problems for public water supplies and effectively manage the agency response.

Please let me know if you have any questions about this letter or the reasons for my support of this improvement in the definition of drought in the state.

No other comments were received from the public concerning the proposed rule.

### **3. Agency Response**

The Department of Natural Resources was invited to respond to the written comments by Jack Wittman. Mark E. Basch, LPG, Section Head for Water Rights and Use, Division of Water, endorsed the changes and articulated on July 30, 2008 modifications to proposed 312 IAC 6.3-5-2 to implement them:

#### **312 IAC 6.3-5-2 Drought alerts**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

Sec. 2. (a) The director of the department may declare a drought alert for a designated reservoir based upon a drought emergency plan approved by the commission. A drought alert shall apply the ~~Palmer Hydrologic Drought Index or exceedance values of regionalized monthly average stream flows.~~ Standardized Precipitation Index (SPI), U.S. Drought Monitor and below normal percentile of regionalized monthly average streamflow.

(b) From least severe to most severe, a drought alert shall be declared as a drought watch, drought warning, or drought emergency.

(c) Contingency plans shall be specified for a drought alert in any of the following:

- (1) A drought emergency plan approved by the commission.
- (2) The terms of a particular drought alert.
- (3) A contract for the withdrawal of water or the release of water from a reservoir.

(d) The stages of a drought alert and their associated criteria are as follows:

(1) A declaration of a drought watch is appropriate when either two of the following indicators occur:

- (A) the ~~Palmer Hydrologic Drought Index is -2.00 to -2.99~~ Standardized Precipitation Index is -1.00 to -1.49; or
- (B) the ~~percentage of time flow is equaled or exceeded 75% to 90%~~ streamflow as percentile of normal is 10 to 24;
- (C) a U.S. Drought Monitor value of D1.

(2) A declaration of drought warning is appropriate when either two of the following indicators occur:

- (A) the ~~Palmer Hydrologic Drought Index is -3.00 to -3.99~~ Standardized Precipitation Index is -1.50 to -1.99; or
- (B) the ~~percentage of time flow is equaled or exceeded 90% to 95%~~ streamflow as percentile of normal is 6 to 9
- (C) a U.S. Drought Monitor value of D2.

(3) A declaration of drought emergency is appropriate when either two of the following indicators occur:

(A) the ~~Palmer Hydrologic Drought Index is -4.00 or less~~  
Standardized Precipitation Index is -2.00 or less ;or  
 (B) the ~~percentage of time flow is equaled or exceeded more 95%~~ streamflow  
as percentile of normal is 5 or less  
 (C) a U.S. Drought Monitor value of D3 to D4.  
 (Natural Resources Commission; 312 IAC 6.3-5-2)

Basch also reported that 312 IAC 6.3, including the proposed amendments to 312 IAC 6.3-5-2, were shared with the Indiana Water Shortage Task Force on July 25, 2008. The Indiana General Assembly created the Task Force in 2006 for a variety of purposes, including the establishment of procedures “to monitor, assess, and inform the public about the status of surface and ground water shortages for all uses in all watersheds, especially shortages due to drought.” Basch said individual members of the Task Force expressed general support for the rule proposals.

At the request of the hearing officer, the Division of Water also provided a synopsis of why the agency believes the Standard Precipitation Index should be substituted for the Palmer Hydrologic Drought Index. Jerry Unterreiner, Ph., D., LPG, Section Head for the Resource Assessment Section of the Division of Water, Ph.D., wrote in an email dated August 13, 2008:

I was the agency committee member on the Water Shortage Task Force drought triggers work group and am responding to your request for a brief explanation for the change in drought indices. The Water Shortage Task Force adopted the Standardized Precipitation Index (SPI) for the update of Indiana's Water Shortage Plan as the meteorological drought index over the Palmer Hydrologic Drought Index (PHDI) after much scrutiny. Scientific research has shown that the SPI, developed in 1993, provides an early warning of drought and its severity, compared to the older PHDI which lags behind the SPI. Two studies in particular have shown this: (1) a study led by the National Climatic Data Center (Guttman, 1998); and (2) an Indiana-based study led by the Indiana State Climatologist, Dev Niyogi, and one of his Ph.D. students. The SPI is calculated from long-term precipitation records for a particular location, is fitted to a probability distribution, and then transformed into a normal distribution; hence, negative values indicate below normal precipitation and positive above normal. The PHDI is developed from precipitation, outflow, and storage. The PHDI, therefore, may change more slowly and has a sluggish response to drought compared to the SPI. The 1-month SPI was chosen as a drought index because of its leading predictability over PHDI for agricultural and short-term drought. The 1-month SPI, for the update of Indiana's Water Shortage Plan, will be used in conjunction with the U.S. Drought Monitor and specified below normal Streamflow Percentiles.

**4. Analysis**

For consideration is an important but narrowly applied new rule that would underline the Indiana General Assembly's growing recognition of the need to carefully manage the quantity of water reserves. Direct communications were made to holders of water withdrawal contracts to inform them of the rule proposal. 312 IAC 6.3 was informally reviewed by the Advisory Council membership and given preliminary adoption by the Commission. In addition, the proposed rules have been considered by members of the Water Shortage Task Force. 312 IAC 6.3 is appropriate to assisting with the implementation of PL 231-2007 (and IC 14-25-2). More broadly, the proposal is harmonious with legislative concerns for water quantity protection.

312 IAC 6.3 may be given final adoption in the form given preliminary adoption. The modifications proposed by Jack Wittman of the Water Shortage Task Force, and endorsed by the DNR's Division of Water, offer a refinement to the language given preliminary adoption. This modified form with a few minor clerical adjustments is presented in Exhibit "A" for consideration as to final adoption, but with the view the Commission might yet properly elect to final adopt the form given preliminary adoption.

**II. CONSIDERATION FOR FINAL ADOPTION**

Presented for consideration by the Natural Resources Commission on final adoption is 312 IAC 6.3 as set forth in Exhibit "A".

Dated: August 15, 2008

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Stephen L. Lucas  
Hearing Officer

## **Exhibit “A”**

### **TITLE 312 NATURAL RESOURCES COMMISSION**

#### **Final Rule**

LSA Document #08-131(F)

#### **DIGEST**

Adds 312 IAC 6.3 to assist with the application of P.L.231-2007 to IC 14-25-2 with respect to water withdrawal contracts for water supply purposes from the water supply in reservoir impoundments that are financed by the state. Effective 30 days after filing with the Publisher.

#### **312 IAC 6.3**

SECTION 1. 312 IAC 6.3 IS ADDED TO READ AS FOLLOWS:

#### **ARTICLE 6.3. WATER WITHDRAWAL CONTRACTS FROM STATE RESERVOIRS**

##### **Rule 1. Applicability**

##### **312 IAC 6.3-1-1 Purpose and scope**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

**Sec. 1. (a) This article assists with the application of P.L.231-2007 to IC 14-25-2.**

**(b) The article applies to contracts for the withdrawal or release of water supply storage from a reservoir, including provisions for the following:**

- (1) The review of contract proposals.**
- (2) The administration of contracts.**
- (3) The expiration or other termination of contracts.**

**(c) A person must not withdraw or obtain the release of water from a reservoir except as provided in:**

- (1) the terms of a contract; or**
  - (2) an exemption from a contract requirement under IC 14-25-2 and this article.**
- (Natural Resources Commission; 312 IAC 6.3-1-1)*

**312 IAC 6.3-1-2 Applicability to contracts for water withdrawals**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

**Sec. 2. (a) This article governs the procedures for, and the substance of, consideration of any contract proposal made to the state and submitted to the division after February 28, 2009, for the withdrawal or release of water from the water supply storage of a reservoir.**

**(b) A contract for the withdrawal or release of water supply storage from a reservoir, which was entered by the state before March 1, 2009, is governed by the terms of the contract and by any statute or rule in effect when the contract was entered.**

**(c) Upon the expiration or termination of a contract governed by subsection (a) or (b), any water withdrawal or taking of a release must cease unless a new contract is approved under IC 14-25-2 and this article.**

*(Natural Resources Commission; 312 IAC 6.3-1-2)*

**312 IAC 6.3-1-3 Administration by the department's division of water**

Authority: IC 14-10-2-4; IC 14-25-1-11

Affected: IC 14-10-2-3; IC 14-25-2

**Sec. 3. (a) The division shall:**

**(1) serve as the point of contact; and**

**(2) coordinate the administrative, professional, and technical functions of this article.**

**(b) Subject to IC 14-10-2-3, the division director shall issue any order appropriate to implementation of this article.**

*(Natural Resources Commission; 312 IAC 6.3-1-3)*

**Rule 2. Definitions**

**312 IAC 6.3-2-1 Definitions applicable to water withdrawal contracts**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-8; IC 14-25-2

**Sec. 1. This rule provides definitions that:**

**(1) apply to this article; and**

**(2) are in addition to those set forth in:**

**(A) IC 14-8;**

**(B) IC 14-25-2; and**

**(C) 312 IAC 1.**

*(Natural Resources Commission; 312 IAC 6.3-2-1)*

**312 IAC 6.3-2-2 "Authorizing legislation" defined**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2; IC 14-26-4-12

**Sec. 2. "Authorizing legislation" means the federal or state legislation that provides legal authority for the construction or maintenance of a reservoir.**

**Examples are as follows:**

**(1) 44 U.S.C. 390b to 44 U.S.C. 390f.**

**(2) IC 14-26-4-12.**

**(3) With respect to a contract for water withdrawal or a release of water described in 312 IAC 6.3-1-2, any federal or state legislation cited in the contract.**

*(Natural Resources Commission; 312 IAC 6.3-2-2)*

**312 IAC 6.3-2-3 "Corps of engineers" defined**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

**Sec. 3. "Corps of engineers" refers to the U.S. Army Corps of Engineers.**

*(Natural Resources Commission; 312 IAC 6.3-2-3)*

**312 IAC 6.3-2-4 "Division" defined**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

**Sec. 4. "Division" refers to the division of water of the department unless another division of the department is specified.**

*(Natural Resources Commission; 312 IAC 6.3-2-4)*

**312 IAC 6.3-2-5 "Minimum quantities of stream flow" defined and determined**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 4-21.5-3-5; IC 14-25-2; IC 14-25-7-14

**Sec. 5. (a) Except as provided in this section, "minimum quantities of stream flow" refers to an order, which implements the standards of IC 14-25-7-14, determined at a point of discharge of a reservoir's outlet works.**

**(b) With respect to the following reservoirs, "minimum quantities of stream flow" refers to the following:**

(1) For Brookville Lake, forty (40) cubic feet per second above elevation seven hundred thirteen (713) feet, National Geodetic Vertical Datum of 1929 (NGVD-29).

(2) For Hardy Lake, five-tenths (0.5) cubic feet per second.

(3) For Monroe Lake, fifty (50) cubic feet per second whenever the reservoir pool is above elevation five hundred fifteen (515) feet, National Geodetic Vertical Datum of 1929 (NGVD-29). When lower than this elevation, the minimum quantities of stream flow are as determined by the corps of engineers.

(4) For Patoka Lake, five (5) cubic feet per second whenever the reservoir pool is above elevation five hundred six (506) feet, National Geodetic Vertical Datum of 1929 (NGVD-29). When lower than this elevation, the minimum quantities of stream flow are as determined by the corps of engineers.

(c) A person may petition the division director to determine an impoundment, not listed in subsection (b), is a reservoir subject to this article. If the petition is granted, the division director shall also determine the minimum quantities of stream flow for the reservoir. A determination under this subsection is a determination of status under IC 4-21.5-3-5.

*(Natural Resources Commission; 312 IAC 6.3-2-5)*

#### **312 IAC 6.3-2-6 "Reservoir" defined**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

**Sec. 6. "Reservoir" means an impoundment that:**

(1) contains water supply storage; and

(2) was financed, or parts of which were financed, by the state.

*(Natural Resources Commission; 312 IAC 6.3-2-6)*

#### **312 IAC 6.3-2-7 "Withdrawal or release of water" defined**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

**Sec. 7. "Withdrawal or release of water" means the:**

(1) physical removal of water from or beneath a reservoir; or

(2) outflow of water from a reservoir to maintain stream flow.

*(Natural Resources Commission; 312 IAC 6.3-2-7)*

#### **Rule 3. Procedures**

##### **312 IAC 6.3-3-1 Request for water withdrawal or release from a reservoir**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2-2

**Sec. 1. (a) A person that seeks to contract with the commission for the:**  
**(1) provision of certain minimum quantities of stream flow; or**  
**(2) sale of water on a unit pricing basis;**  
**under IC 14-25-2-2, must submit a written request to the division under this article.**

**(b) A written request under subsection (a) must be completed and must include the following information:**

- (1) The name, address, e-mail address, and telephone number of the following:**
  - (A) The person that would enter the contract.**
  - (B) At least one (1) individual to serve as a point of contact for the person that would enter the contract.**
- (2) If another person is acting for the person described in subdivision (1), the same information for the other person as is described in subdivision (1).**
- (3) The location where any withdrawal or release from a reservoir would occur.**
- (4) The proposed use or uses of the withdrawal or release.**
- (5) The location of the proposed use or uses described in subdivision (4).**
- (6) The proposed daily limit for the withdrawal or release of water (or pump capacity, if the limit is proposed to be based upon a pump capacity).**
- (7) The proposed term, in years, of the contract and a justification for the proposed term.**
- (8) The proposed method for measuring the withdrawal or release of water.**
- (9) A summary of alternative water supply sources that were considered.**
- (10) A justification for why the reservoir is the most economic or feasible supply source.**
- (11) A conservation plan.**

**(c) A written request under subsection (a) is not complete until the person submits, as part of the application:**

- (1) a contingency plan that describes the alternatives the person will use if the withdrawal or release of water from the reservoir is restricted due to a drought alert described in 312 IAC 6.3-5-2; or**
- (2) a statement that the person agrees to withstand the results of not being able to receive water from the reservoir.**

**(d) A contract shall not be executed unless the:**  
**(1) contingency plan is feasible; or**  
**(2) person seeking the contract agrees to withstand the results of not being able to receive water from the reservoir.**

*(Natural Resources Commission; 312 IAC 6.3-3-1)*

**312 IAC 6.3-3-2 Notice by division of water to interested persons**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2-2.5

**Sec. 2. The division shall provide notice as follows:**

**(1) Not later than thirty (30) days after receiving a complete request under section 1 of this rule, provide notice by certified mail to the persons described in IC 14-25-2-2.5(c).**

**(2) As soon as practicable, cause notice by publication in each county described in IC 14-25-2-2.5(f).**

*(Natural Resources Commission; 312 IAC 6.3-3-2)*

**312 IAC 6.3-3-3 Public meetings**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 4-21.5; IC 14-25-2-2.5

**Sec. 3. (a) The division director shall appoint a department employee to serve as hearing officer for any public meeting under IC 14-25-2-2.5(h).**

**(b) The public meeting shall include the following:**

**(1) A presentation by the department describing the following:**

**(A) The nature of the pending request.**

**(B) The process by which the commission will determine whether to enter into a contract with the person making the request. The process shall reference IC 14-25-2 and this article.**

**(2) An opportunity for public comment on the pending request.**

**(c) A hearing officer shall conduct the public meeting in a manner that is best suited to the solicitation of public comments in support of fact-finding. Neither the rules of evidence nor IC 4-21.5 apply.**

**(d) A hearing officer shall maintain a record of the public meeting to assist in providing written recommendations to the advisory council. Any other person may also cause a recording to be made of the public meeting, but the official record is maintained by the hearing officer.**

*(Natural Resources Commission; 312 IAC 6.3-3-3)*

**312 IAC 6.3-3-4 Advisory council report summary and recommendations**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 5-14-1.5; IC 14-25-2-2

**Sec. 4. (a) As soon as practicable following the public meeting, the hearing officer shall deliver a written summary of the meeting and any recommendations to the advisory council.**

**(b) The written summary required under subsection (a) shall, in anticipation of the memorandum required under IC 14-25-2-2(c), also consider the effect that exercise of the contract may have on recreational facilities.**

**(c) The advisory council shall consider the hearing officer's written summary and recommendations during a public meeting held under IC 5-14-1.5.**

**(d) The advisory council is not limited to the written summary and recommendations of the hearing officer, but may also consider the following:**

**(1) Recommendations of the division of state parks and reservoirs or another division of the department that manages the reservoir from which the water would be withdrawn or released.**

**(2) Recommendations from a federal, state, or local agency with expertise regarding water usage and supply.**

**(3) Information received before or during an advisory council meeting.**

**(e) Not later than thirty (30) days after the final public meeting under section 3 of this rule, the advisory council shall submit to the commission a report summarizing the public meeting or meetings. The report may be accompanied by recommendations that duplicate, augment, or contrast with those of the hearing officer.**

*(Natural Resources Commission; 312 IAC 6.3-3-4)*

**312 IAC 6.3-3-5 Commission action on contract and subsequent approvals**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 4-21.5-2-5; IC 5-14-1.5; IC 14-25-2-2

**Sec. 5. (a) During a public meeting under IC 5-14-1.5, the commission may deliberate as to whether to approve a person's written request for the:**

**(1) provision of certain minimum quantities of stream flow; or**

**(2) sale of water on a unit pricing basis.**

**(b) The commission shall include in its deliberations a consideration of the following:**

**(1) The standards provided by IC 14-25-2 and this article.**

**(2) The report of the advisory council submitted under section 4(e) of this rule.**

**(3) Other statements or documents the commission elects to receive before or during the meeting.**

**(c) Consistent with subsection (b), the commission:**

**(1) shall determine to approve, condition, or deny a person's request; and**

**(2) may elect to execute a contract under IC 14-25-2-2(a)(1).**

**If the commission elects to execute a contract, the contract shall be delivered to the division. A determination under this subsection is governed by IC 4-21.5-2-5(11).**

**(d) Within twenty (20) days after receiving a contract delivered under subsection (c), the division shall submit the memorandum required under IC 14-25-2-2(c)(2) to the governor for the governor's consideration.**

**(e) A contract executed by the commission under subsection (c) is subject to approval by each of the following:**

**(1) The attorney general.**

**(2) The governor.**

**(3) The person desiring the use.**

*(Natural Resources Commission; 312 IAC 6.3-3-5)*

#### **Rule 4. Contract Terms and Conditions**

##### **312 IAC 6.3-4-1 Water allocation factors**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-1-3; IC 14-25-2

**Sec. 1. This section establishes the following factors that the commission shall consider in reviewing, and for acting upon, a person's written request for the provision of certain minimum quantities of stream flow or for the sale of water on a unit pricing basis:**

**(1) The terms, conditions, and purposes of the authorizing legislation.**

**(2) The likelihood of adverse effects to:**

**(A) public safety;**

**(B) the environment;**

**(C) navigation; or**

**(D) recreation.**

**(3) The availability of another source of water to the person making the request.**

**(4) The proximity to the reservoir of any person that would receive water from the person making the request.**

**(5) Water allocation priorities for use of the water as follows:**

**(A) First priority is for the use of water for domestic purposes as described in IC 14-25-1-3.**

**(B) Second priority is for the use of health and safety.**

**(C) Third priority is for power production that meets the contingency planning provisions of the drought alerts described in 312 IAC 6.3-5-2.**

(D) Fourth priority is for industry and agriculture (not described in clause (A), (B), or (C)) that meets the contingency planning provisions of the drought alerts described in 312 IAC 6.3-5-2.

(E) Fifth priority is for a purpose described in clause (C) or (D) that does not meet the contingency planning provisions of the drought alerts described in 312 IAC 6.3-5-2.

(F) Sixth priority is for any other purpose.

(6) If the person making the request provides water to others (and the others provide for uses that include multiple priorities under subdivision (5)), the extent to which the person demonstrates an ability to implement the priorities for water allocation that are set by subdivision (5).

*(Natural Resources Commission; 312 IAC 6.3-4-1)*

### **312 IAC 6.3-4-2 Duration of a contract**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2; IC 14-25-7-11

**Sec. 2. (a) The commission shall not approve a contract that covers a period that is longer than authorized by a plan for water resource management approved under IC 14-25-7-11.**

**(b) In determining the duration of a contract, the commission may consider the water allocation factors in section 1 of this rule.**

**(c) Notwithstanding subsections (a) and (b), a contract entered under IC 14-25-2 and this article shall not cover a period of more than fifty (50) years.**

*(Natural Resources Commission; 312 IAC 6.3-4-2)*

### **Rule 5. Drought Alerts and Emergency Measures**

#### **312 IAC 6.3-5-1 Application of rule for drought alerts and emergencies**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

**Sec. 1. Unless exempted by 312 IAC 6.3-1-2(b), this rule governs any contract for a water withdrawal or release from a reservoir that occurs during a drought alert or another emergency.**

*(Natural Resources Commission; 312 IAC 6.3-5-1)*

**312 IAC 6.3-5-2 Drought alerts**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

**Sec. 2. (a) The director of the department may declare a drought alert for a designated reservoir based upon a drought emergency plan approved by the commission. A drought alert shall apply the Standardized Precipitation Index, U.S. Drought Monitor and below normal percentile of regionalized monthly average streamflow.**

**(b) From least severe to most severe, a drought alert shall be declared as a:**

- (1) drought watch;**
- (2) drought warning; or**
- (3) drought emergency.**

**(c) Contingency plans shall be specified for a drought alert in any of the following:**

- (1) A drought emergency plan approved by the commission.**
- (2) The terms of a particular drought alert.**
- (3) A contract for the withdrawal of water or the release of water from a reservoir.**

**(d) The stages of drought alerts and their associated criteria are as follows:**

**(1) A declaration of drought watch is appropriate when at least two (2) of the following occur:**

- (A) The Standardize Precipitation Index is -1.00 to -1.49.**
- (B) The stream flow as a percentile of normal is ten (10) to twenty-four (24).**
- (C) The U.S. Drought Monitor value is D1 or more severe.**

**(2) A declaration of drought warning is appropriate when at least two (2) of the following occur:**

- (A) The Standardized Precipitation Index is -1.50 to -1.99.**
- (B) The stream flow as a percentile of normal is six (6) to nine (9).**
- (C) The U.S. Drought Monitor value is D2 or more severe.**

**(3) A declaration of drought emergency is appropriate when at least two (2) of the following occur:**

- (A) The Standardized Precipitation Index is -2.00 or less.**
- (B) The stream flow as a percentile of normal is five (5) or less.**
- (C) The U.S. Drought Monitor value is from D3 to D4.**

*(Natural Resources Commission; 312 IAC 6.3-5-2)*

**312 IAC 6.3-5-3 Emergency measures to protect life or property**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

**Sec. 3. (a) The department and the corps of engineers may take the emergency measures they individually or jointly determine necessary in the operation of a reservoir, including lowering the elevation of the water below an elevation at which water may be withdrawn or released under a contract, to protect life or property.**

**(b) Notwithstanding subsection (a), the department and the corps of engineers may enter any agreement between them as to which governmental entity shall exercise the authority described in subsection (a).**

**(c) A contract entered under this article for the withdrawal or release of water from a reservoir is subordinate to an exercise of authority under this section.**

**(d) No third person has a right of action against the department or the corps of engineers based upon an exercise of authority under this section.**

*(Natural Resources Commission; 312 IAC 6.3-5-3)*

**Rule 6. Enforcement**

**312 IAC 6.3-6-1 Enforcement**

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

**Sec. 1. (a) The secretary of the commission may suspend or revoke any contract for the withdrawal or release of water where the person obtaining the contract:**

**(1) Breaches the contract.**

**(2) Violates IC 14-25-2 or this article.**

**(3) For any improvement constructed or caused by the person to be constructed with respect to the withdrawal or release of water or for the subsequent distribution of the water, fails to exercise due diligence to require another person using the improvement to conduct activities consistently with:**

**(A) the contract;**

**(B) IC 14-25-2; and**

**(C) this article.**

**(b) The remedy described in subsection (a) is in addition to any other remedy provided by law.**

*(Natural Resources Commission; 312 IAC 6.3-6-1)*